

A license of canned software is subject to Retailers' Occupation Tax liability if all of the criteria set out in 86 Ill. Adm. Code 130.1935(a)(1) are not met. (This is a GIL.)

May 21, 2007

Dear Xxxxx:

This letter is in response to your letter dated August 22, 2006, in which you request information. We apologize for the delay in responding to your inquiry. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

This letter is in response to your letter dated 4/24/06, which was in response to my letter asking if many items that we sell to customer [sic] in the state of IL are taxable. This is becoming very frustrating. We have been trying to find out these answers for months so that we are proceeding in accordance to your states [sic] regulations. We receive response but not with clear answers. We asked if eleven items were taxable in IL and you answer only one of my questions and then referred me to 86Ill. [sic] Adm. Code Sec. 130.1953. We have reviewed this code over and over. We do not see in this code where it specifically tells us if the recurring license fee, hosting fee, programming, consulting, training, training over the web, implementation, transactions, fixed fees, billable support are tax [sic] or not in the state of IL.

I am going to list where I think certain areas of the Code relate to our items. Please let me know if you agree and if I am correct.

Recurring license fee - is not taxable per section 130.1935(a)(1).

Programming - is not taxable per section 130.1935(2).

Consulting, Training, Training over the Web, Implementation, and Billable Support - are not taxable per section 130.1935(b).

The items left are hosting fee, transactions, and fixed fees. I can not even begin to see where the items might relate to 86Ill. [sic] Adm. Code Sec. 130.1953. Please advise me

to the section of 86Ill. [sic] Adm. Code Sec. 130.1953 that the hosting fee, transactions, and fixed fees would fall in?

Please refer to the enclosed copy of the first letter I sent on February 13, 2006 to review what the descriptions of these items are. If you have questions or need further explanation of these items please call me.

Your prompt response to this inquiry would be very much appreciated.

DEPARTMENT'S RESPONSE:

Please be advised that Mr. Boggess is no longer with the Department. Our prior letter to you dated April 24, 2006 (ST 06-0092-GIL) described how software maintenance agreements are taxed in this State. Your current letter asks us to confirm that, based upon the information in that letter and your previous letter, that the recurring licensing fee your company provides is not taxable pursuant to Section 130.1935(a)(1) of the Department's administrative rules.

If transactions for the licensing of computer software meet all of the criteria provided in subsection (a)(1) of Section 130.1935, neither the transfer of the software nor the subsequent software updates will be subject to Retailers' Occupation Tax. A license of software is not a taxable retail sale if:

- A) It is evidenced by a written agreement signed by the licensor and the customer;
- B) It restricts the customer's duplication and use of the software;
- C) It prohibits the customer from licensing, sublicensing or transferring the software to a third party (except to a related party) without the permission and continued control of the licensor;
- D) The licensor has a policy of providing another copy at minimal or no charge if the customer loses or damages the software, or permitting the licensee to make and keep an archival copy, and such policy is either stated in the license agreement, supported by the licensor's books and records, or supported by a notarized statement made under penalties of perjury by the licensor; and
- E) The customer must destroy or return all copies of the software to the licensor at the end of the license period. This provision is deemed to be met, in the case of a perpetual license, without being set forth in the license agreement.

A license of canned software is subject to Retailers' Occupation Tax liability if all of the criteria set out in 86 Ill. Adm. Code 130.1935(a)(1) are not met. Our office does not provide binding responses in the context of General Information Letters. However, we have noted that the agreement you provided with your original letter does not appear to meet the first requirement of a written agreement signed by the licensor and the customer. In addition, the agreement also does not appear to meet most of the remainder of those requirements.

Your letter also requests a determination regarding the charges for programming ("modifications/enhancements to the already purchased canned software"). If the programming involves the transfer of canned computer software (such as a patch provided by a software company for example), then those charges would generally be subject to tax. However, if the programming

involves the transfer of custom computer software as provided in 86 Ill. Adm. Code 130. 1935(c), then the charges for that programming are not generally subject to tax.

In regards to the consulting, training, implementation and billable support, hosting fees, transaction fees, and fixed fees described in your letters and attached information, if those charges are separately contracted for from the sale or licensing of the canned software and those charges represent services where no tangible personal property is transferred, then those charges are generally not subject to tax.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Terry D. Charlton
Senior Counsel, Sales & Excise Taxes

TDC:msk